

2002 BCSECCOM 802

COR#02/104

Decision

Malcolm Stevenson

Section 161 of the *Securities Act*, RSBC 1996, c. 418

Hearing

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| Panel | Joyce C. Maykut, Q.C. Neil Alexander Roy Wares | Vice Chair Commissioner Commissioner |
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Date of Hearing June 18, 2002

Date of Decision September 18, 2002

Appearing

C. Paige Leggat For Commission Staff

Introduction

- ¶ 1 This is a hearing under section 161(1) of the Act against Malcolm Stevenson. The notice of hearing, dated February 21, 2002, alleged that Stevenson, as an insider of a public company, failed to file trade reports as required under section 87 of the Act.
- ¶ 2 The facts are not in dispute and are set out in an agreed statement of facts. This hearing is to determine the appropriate sanction. We must decide what sanction should be made in the public interest based on the following agreed facts.
- ¶ 3 At various times between May 1996 to December 1998, the relevant period, Stevenson was the president, secretary-treasurer and chief financial officer of Diversified Investment Strategies Inc. Diversified was a reporting issuer under the Act and its securities traded on the Alberta Stock Exchange.
- ¶ 4 While Stevenson was an insider, he acquired 566,392 options and acquired or disposed of approximately 935,600 shares of Diversified in 329 transactions. Stevenson filed insider reports in 17 of the 25 months he was required to file, however most of the reports were filed late and most contained incomplete or inaccurate information. There was significant trading (over 7 million shares) in

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Diversified during the 25-month period. Stevenson's trading represented approximately 13% of that trading and was over \$1.7 million in value. In each month of the 25-month period there was at least a 20% fluctuation in the prices at which the shares traded.

- ¶ 5 On January 20, 1999 Commission staff issued a cease trade order against Stevenson for his failure to file insider reports. Stevenson then filed his outstanding and corrected insider reports and paid \$850 in late filing fees as required under section 22 of the *Securities Regulation*, BC Reg. 196/97. The cease trade order was revoked on February 9, 1999. Stevenson resigned from Diversified in January 2000 and has not acted as a director or officer of any reporting issuer since then.
- ¶ 6 Stevenson agreed he failed to file insider reports contrary to section 87 of the Act and section 155 of the *Securities Rules*, BC Reg. 194/97.
- ¶ 7 On the basis of these facts, Commission staff is seeking orders that Stevenson:
1. be prohibited from using the trading exemptions under the Act for four years, except where he is trading securities for his own account;
 2. pay an \$8,000 administrative penalty;
 3. be prohibited from acting as a director or officer of any issuer ending on the later of four years from the date of the order, the date he pays the \$8,000 penalty or the date he completes a course of study satisfactory to the Executive Director concerning the duties and responsibilities of directors and officers of public companies.
- ¶ 8 Staff emphasized that they were not seeking an order for costs.

Analysis

- ¶ 9 On the basis of the agreed facts we must decide what orders, if any, are required to be made in the public interest under section 161(1) and 162 of the Act.
- ¶ 10 In a similar case, *Re Frederick George Orr* 2001 BCSECCOM 1106, the Commission reviewed the relevant case law concerning the Commission's public interest jurisdiction to make orders under section 161(1) generally, and specifically in the context of a failure to file insider trade reports.
- ¶ 11 As in previous cases, the Commission in *Orr* began by re-emphasizing the importance to the market of timely disclosure of insider trading by referring at

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paragraph 19 to *Re Seven Mile High Group Inc.* [1991] 47 BCSC Weekly Summary 7. There the Commission said (at page 36):

The information provided by insider trading reports is important market information, as it discloses to market participants the trading activities of the persons most closely connected to, and therefore in a position to be most knowledgeable about, a reporting issuer. Timely reporting is particularly important where, as in this case, the insider is an active trader.

¶ 12 The Commission went on to state in *Orr* at paragraph 20 that:

A failure to file reports when required can be presumed to have some deleterious effects on other investors and the market, even in the absence of evidence of actual harm.

¶ 13 Then the Commission outlined the relevant factors to consider when determining sanctions where there has been a failure to file these reports. At paragraph 23 of *Orr* the Commission concluded that the following factors were particularly relevant:

- the volume of shares in the unreported trades compared to total trading in the stock,
- the number of unreported trades,
- the duration of the non-compliance,
- whether the respondent disclosed and rectified the deficiencies voluntarily,
- the respondent's subsequent conduct,
- the respondent's previous disciplinary history,
- the respondent's cooperation with the Commission staff investigation, and
- the presence of any aggravating factors.

¶ 14 In this case, we have the following:

- Stevenson's trades and the volumes of shares traded were significant relative to the general market activity in the shares of the company.
- Stevenson's non-compliance covered 32 months.
- Stevenson did not come forward voluntarily to disclose and rectify the situation until the cease trade order issued.
- Stevenson then filed his outstanding reports and paid \$850 in late filing fees.
- Stevenson cooperated with the staff's investigation.
- Stevenson resigned as a director and officer of Diversified in January 2000 and has not been a director or officer of any other reporting issuer since.
- Stevenson has no previous disciplinary history with the Commission.

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- There was no evidence of aggravating factors, such as manipulation, or trading on, and obtaining financial benefit from, inside information.
- ¶ 15 As in *Orr*, we reviewed the range of sanctions in several Commission decisions and settlements in these types of cases.
- ¶ 16 In summary, these cases indicate that where there were no aggravating factors, exemptions were denied in all but one case and ranged from six months to 36 months. In the case of *Re Lloyd* [1996] 8 BCSC Weekly Summary 76, where there were aggravating factors the exemptions were withdrawn for five years. Prohibitions against acting as a director or officer were applied in approximately half of the cases. When applied, the prohibition ranged from six to 36 months (*Lloyd* was five years). The course requirement was applied in approximately half of the cases. Administrative penalties were applied in almost all of the cases and ranged from \$1,500 to \$6,000 (*Lloyd* was \$20,000).
- ¶ 17 One case, *Re Steffenson* [2000] 9 BCSC Weekly Summary 11, was particularly relevant and it is useful to describe the facts. Steffenson was an officer and director of Diversified at the same time as Stevenson. Steffenson acquired and disposed of 1,131,400 shares of Diversified in 492 transactions in the 32-month period he was an insider. Steffenson's trading represented approximately 11% of the total 8 million Diversified shares traded in the 32 month period and was over \$1.7 million in value. In 10 of those months, Steffenson's trading represented approximately 18% to 25% of the trading. There was an average 16% fluctuation in the prices at which the shares traded over the 32-month period and in one month it was 130%. Steffenson did not file any insider reports until after a cease trade order was issued against him. Steffenson consented to a three-year director and officer ban and to take the officers and directors course, a three-year trading ban (except for his own account) and a \$6000 penalty (\$1000 of which was represented costs of the investigation). There were no aggravating factors.
- ¶ 18 Despite the similarity between the Stevenson and *Steffenson* cases, staff argue a greater sanction should be levied against Stevenson because he did not settle and preparing for a hearing involves greater costs. Staff say respondents who settle should be given a lesser sanction both in the monetary payment and in the amount of time they are prohibited from participating in the markets.
- ¶ 19 Regulatory orders made in the public interest under section 161(1) and 162 of the Act are for the protection of investors, and the efficiency of, and the public confidence in, capital markets generally. They are not intended to be punitive but preventative. For the most part, the underlying principles and factors relevant to determining what orders ought to be made in the public interest in cases where

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there is a failure to file insider reports, should apply equally to contested proceedings as consent proceedings.

- ¶ 20 In considering what orders ought to be made in the public interest, we see little to distinguish Stevenson from *Steffenson*. However, the collapse of Stevenson's settlement has precipitated this hearing and incurred additional costs. We note that Stevenson has not been a director or officer of any reporting issuer since January 2000.
- ¶ 21 Although there were no aggravating factors in Stevenson's case, his trading was significant relative to the general market activity in the shares of the company. We find that his conduct falls considerably below the standard expected of an insider and director of a reporting issuer. Therefore, we consider it to be in the public interest to order:
1. under section 161(1)(c) of the Act that the exemptions described in sections 44 to 47, 74, 75, 98 and 99 of the Act do not apply to Stevenson for a period of three years from the date of this order, except subject to clause 2, that Stevenson may rely on section 45(2)(7) of the Act to trade in securities for his own account;
 2. under section 161(1)(b)(ii) of the Act, where Stevenson is an insider of a reporting issuer, that he is prohibited from purchasing and trading any securities of the issuer for three years from the date of this order;
 3. under section 161(1)(d)(ii) of the Act that Stevenson is prohibited from becoming or acting as a director or officer of any reporting issuer until the later of
 - (a) one year from the date of this order, and
 - (b) the date he has both successfully completed a course of study satisfactory to the Executive Director concerning the duties and responsibilities of directors and officers and filed with the Executive Director evidence that he has successfully completed the course;
 4. under section 162 of the Act that Stevenson pay an administrative penalty of \$6,000.
- ¶ 22 In light of our decision, the parties are at liberty to make further submissions respecting an order under section 174 of the Act that Stevenson pay prescribed fees or charges for the costs of, or related to, the hearing.

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¶ 23 September 18, 2002

¶ 24 **For the Commission**

Joyce C. Maykut, Q.C.
Vice Chair

Neil Alexander
Commissioner

Roy Wares
Commissioner